DOCUMENT RESUME

ED 226 624 HE 015 557

TITLE	[Deregulation and Higher Education].
INSTITUTION	National Association of Coll. and Univ. Business Officers, Washington, D.C.
PUB DATE	May 82
NOTE	9p.; "Portfolio" articles.
AVAILABLE FROM	National Association of College and University Business Officers, One Dupont Circle, Suite 510, Washington, DC 20036 (1-9 copies free; 10 or more copies, $.25 a copy).
PUB TYPE	Viewpoints (120) -- Journal Articles (080)
JOURNAL CIT	Business Officer; p15-21 May 1982
EDRS PRICE	MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	*Accountability; *Civil Rights Legislation; Court Litigation; Eligibility; *Federal Aid; Federal Government; *Federal Regulation; Government School Relationship; *Higher Education; Need Analysis (Student Financial Aid); Occupational Safety and Health; Program Evaluation; *Student Financial Aid
IDENTIFIERS	Department of Education; Department of Labor; Environmental Protection Agency; Equal Employment Opportunity Commission; Office of Management and Budget; Reagan (Ronald)

ABSTRACT

The extent to which the Reagan Administration has achieved its deregulation goals in the area of higher education is addressed in three articles: "Deregulation and Higher Education: The View a Year Later" (Sheldon Elliot Steinbach); "Student Financial Aid Deregulation: Rhetoric or Reality?" (Robin E. Jenkins); and "Administration Reform of Civil Rights Rules: A Year's Work?" (R. Claire Guthrie). Steinbach notes that there are many regulations that diminish the productivity of colleges and universities without contributing any corresponding benefit. To be meaningful for higher education, deregulation must include changes in the tone of regulations enforcement. Among the areas of concern are Circular A-21 of the Office of Management and Budget (OMB) and Department of Education (ED) regulations relating to Title IX of the Higher Education Act of 1972. Jenkins addresses regulatory and communications difficulties surrounding student aid programs. The OMB and ED have approached Congress with a request to redirect $3 million of funds that would otherwise be used for student financial aid to pay the cost overrun incurred in printing Pell program validation requirements on student eligibility reports. ED also plans to require colleges to undergo biannual financial audits conducted by independent external auditors plus program reviews conducted by ED's regional program staff. Guthrie notes that although ED has sought to limit the scope of the agency's jurisdiction to investigate discrimination complaints under Title IX, Title VI, and section 504 of the Rehabilitation Act of 1973, no changes in the department's rules have been made to date. Issues in pending litigation are traced. Proposed changes regarding Executive Order 11246, section 503 of the Rehabilitation Act and section 402 of the Vietnam Era Veterans Readjustment Act are noted. (SW)

ED226624

HE 015 557

"PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY

NACUBO

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☑ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

Deregulation—I

Deregulation and Higher Education: The View a Year Later

by SHELDON ELLIOT STEINBACH

"... the regulatory reform movement is somehow losing momentum ... it's ending up as a kind of Henry George Society—meeting once a year to dream about what might have been. The impetus is being lost."

—Robert Crandall (after Antonin Scalia), Regulation, Jan/Feb 1982, page 37

The Reagan Administration was voted into office on a platform that contained a plank advocating getting the federal government "off the backs" of the American people. Since taking the reins of government, the Administration has taken a variety of steps, with limited success, toward making the goal of deregulation a reality.

From the beginning of his Administration, Ronald Reagan made it clear that he is committed to reducing sharply federal red tape and paperwork. In his first week in office, President Reagan created a special Task Force on Regulatory Relief and, to emphasize its importance, appointed Vice President George Bush as its chairman. In the following weeks, the President froze all regulations issued during the last days of the Carter Administration pending a review of whether those rules were necessary. He then issued Executive Order 12291 directing all federal agencies to curtail regulations.

The order, signed by President Reagan on February 17, 1981, stipulated that the potential benefits of executive branch regulations must be greater than their potential cost, and that all notices of proposed and final rules must be reviewed by the Office of Management and Budget (OMB) before publication in the *Federal Register*. By the end of last year, OMB had reviewed over 2,700 proposed regulations. Of that number, approximately 2,400 were found consistent with the executive order without change, 134 were found consistent with minor changes, and 91 were returned to or withdrawn by the agencies.

In addition, 40 "major" new regulations were issued, each with an estimated economic impact of $100 million or more, 19 of which were supported by the Regulatory Impact Analysis (RIA) required by the executive order. The RIA for the remaining 21 major regulations were waived because of emergency conditions. Significantly, during the first ten months of the Reagan Administration, the number of pages in the *Federal Register* fell by one-third compared with the same period last year.

On May 1, 1981, the American Council on Education (ACE), with the aid of several other higher education associations, including NACUBO and its Council on Governmental Relations (COGR), filed a 146-page report with the Task Force on Regulatory Relief. The document pinpointed concerns regarding over 70 regulations administered by approximately 18 different federal agencies. In transmitting the document to the Vice President, ACE President J. W. Peltason stated:

> We believe these recommendations do not require any legislative action and can be implemented without damaging the program objectives the regulations are designed to serve. Nearly all of our suggestions would modify federal

About Deregulation

One of the promises of the Reagan Administration when it took office was to reduce federal paperwork and red tape. As one means of accomplishing this goal, a Task Force on Regulatory Relief was created, chaired by Vice President Bush. At the request of the task force, the American Council on Education and other higher education associations, including NACUBO and its Council on Governmental Relations, submitted a document pinpointing concerns with over 70 regulations.

To what extent the Administration has achieved its deregulation goals in the area of higher education is the subject of the three articles that follow. Sheldon Steinbach writes on some agency successes in deregulation and looks at the Administration's general record in this area; Robin Jenkins looks at problems with student aid deregulation; and R. Claire Guthrie addresses the area of reform of civil rights rules.

Sheldon Elliot Steinbach is general counsel for the American Council on Education.

requirements to accord proper recognition to the legitimate differences of nonprofit educational institutions. Many of the adjustments we recommend relate to problems educational institutions have experienced with the way federal agencies have chosen to enforce various regulations, rather than with the language of the regulations themselves. Among the council's priorities for regulatory reform are: OMB Circular A-21; Department of Education regulations relating to Title IX of the Higher Education Act of 1972; Department of Education regulations pertaining to section 504 of the Rehabilitation Act of 1973; Department of Labor regulations implementing Executive Order 11246; Veterans Administration educational assistance regulations; and EPA hazardous waste disposal regulations. In our view, each of these regulatory requirements diminishes the "productivity" of colleges and universities without contributing any corresponding benefit.

The Vice President's task force has published several "hit lists" of rules to be reviewed and modified, wherever possible, in order to reduce costs. By the end of 1981, approximately 100 rules had been targeted for intensive review.

Although the Administration has demonstrated some reasonable progress toward deregulation, the higher education community has yet to see some of the significant changes that it had hoped would appear within the first year of the Reagan Administration. Meaningful progress may have been slowed by the Administration's focus on budget cuts and tax legislation. In many agencies, political appointments were made extremely slowly, and a substantial amount of time was lost establishing the internal procedures necessary to begin the complicated task of deregulation. In some agencies, incoming political appointees found an entrenched bureaucracy philosophically opposed to many of the Administration's policies. This conflict hampered preparation of option papers and the securing of advice. Lastly, the public and perhaps the Administration discounted the substantial force of bureaucratic inertia.

Among the items of concern to higher education that are scheduled for review and listed in the so-called August "hit list" are Title IX, section 504, and the Employment Selection Validation Guidelines. The Administration has not yet issued formal pronouncements with regard to these regulations, except as compelled by court briefing schedules. (See the deregulation article by R. Claire Guthrie on page 20.)

The A-21 Issue

There are, however, certain indications that the Administration has noted the concerns expressed by the higher education community. The most significant sign to date was publication in the January 7, 1982 *Federal Register* of a proposed revision of Circular A-21 that was based on the revisions of language submitted to OMB by the higher education community relying heavily on the work of COGR and the Association of American Universities.

The revision strikes a reasonable balance between the need for accountability and for the reduction of reporting requirements. It also leaves open an opportunity to work further with OMB to deal with the problems that have marred the relationship between the federal government and the higher education community. Although there are difficulties still to be addressed, the OMB pronouncement offers hope that further relief can be secured.

On February 19, 1982, the Office of Federal Procurement Policy (OFPP) issued new patent regulations that implement the Patent and Trademark Amendments of 1980. The legislation had established a uniform, government-wide policy concerning the disposition of rights to inventions made by universities and small businesses under government grants and contracts. The regulations remove the burden of pre-publication review of papers relating to a patentable process and reflect fully the recommendations of the higher education community.

DOL-EPA-OSHA

Of more significance is the proposed Department of Labor (DOL) regulation that would exclude college and university research and development contracts from the impact of the Service Contract Act. The department's reexamination of regulations on labor standards for federal service contracts accurately reflected the in-

tent of Executive Order 11291 in that the proposed changes were cost-effective, efficient, and the least burdensome alternatives that were consistent with the statutory intent of the Service Contract Act.

The proposed changes would result in substantial cost savings for both contractors and the government and would preserve protection of local wage rates and effective enforcement of the act. The higher education community will benefit particularly from a proposed subsection that would clearly exempt contracts for services to be performed primarily by scientists and physicians, as well as research and development contracts performed principally by professionals. Furthermore, a specific exemption for research and development contracts has been proposed.

Environmental Protection Agency (EPA) regulations proposed on November 17, 1981, allow the disposal of small containers of liquid and solid hazardous waste in landfills, provided the wastes are placed in overpacked drums, or "lab packs." This proposal constitutes an environmentally and economically sound option for generators of small amounts of hazardous waste and demonstrates a significant shift in the agency's attitude toward colleges and universities. The primary concern with certain existing regulations is that they are inappropriately applied to colleges and universities; such regulations seem directed to the control of single, massive waste streams rather than to the multitude of minor waste streams typically found at institutions of higher education. The proposal relating to "lab packs" is highly commendable in that it recognizes the unique aspects of campus laboratories, provides regulatory relief from excessive paperwork and unnecessarily costly procedures, and preserves essential environmental protections.

Along the same lines, Occupational Safety and Health Administration (OSHA) proposed regulations for dealing with carcinogenic material in laboratories demonstrate again the sensitivity of the Administration to some of the real needs of the university community. Institutions were very pleased to note that OSHA recognized that the laboratory environment of colleges and universities is different from industrial production and manufacturing settings, for which substance-specific health standards were proposed. Campus laboratories tend to use very small quantities of a large number of substances—some hazardous—for short periods and at infrequent intervals, rather than using a few substances for protracted intervals. It is also difficult to predict an institution's need for and use of particular substances, including highly toxic or carcinogenic matter. Because it is impossible to establish standards for the use of such substances before the fact, the higher education community supports OSHA's issuance of flexible guidelines, rather than laboratory standards, to protect laboratory workers against exposure to toxic chemicals.

Guidelines would enable OSHA to adjust laboratory practices continuously according to a developing body of scientific knowledge. The issuance of an OSHA substance-specific health standard for laboratories would ultimately produce a monumental amount of paper directives defining permissible exposure limits for a multitude of different substances, thereby assuring only technical compliance with procedural regulations rather than compliance with substantive health precautions.

Enforcement Practices

Institutions of higher education are not requesting exemption from the protective laws prevalent in society as a whole. They are, however, asking that the unreasonable burdens of federal regulations be lifted. Colleges and universities must be allowed to apply their resources to meeting the true goals of higher education: teaching, research, and community service.

To be meaningful for institutions of higher education, deregulation must include changes in the tone of regulations enforcement. During the last decade the relationship between colleges and universities and the federal government has become strained. A major step toward reconciliation could be achieved by a change in the attitude of federal investigators, many of whom prejudge institutions of higher education. The number of future misunderstandings could be reduced if enforcement personnel understand how colleges and universities function. The partnership between government and colleges and universities must be restored so that the productivity of both entities further the public good.

The higher education community is aware that several areas in the deregulation process are being adjusted to accommodate its interests and concerns. Still, there is an underlying fear that the process, now apparently tilting in the favor of higher education, may not ultimately deliver. In addition, many issues that were raised in higher education's regulatory agenda have yet to see any movement toward reform.

Conclusion

One of the most striking aspects of the new Administration has been the receptivity of political appointees to the regulatory concerns of the higher education community. The changes in tone and the willingness to listen may not, however, mean a lasting change in federal regulation of higher education. There is growing suspicion that the Administration has undertaken too much too quickly and a realistic concern that the level of rhetoric, especially as it relates to environmental and civil rights issues, is impeding its ability to make the procedural changes that would have an immediate, dramatic, and lasting benefit for the higher education community. Certain individuals in the Administration seem to feel that if an issue cannot be confronted directly, "backdoor deregulation" can be secured by reducing an agency's enforcement budget. The higher education community realizes, however, that nonenforcement does not constitute deregulation. Whatever relief might accrue would be transitory and would not serve the long-term interests of colleges and universities. An Administration focus on "Band-Aid" measures will cause the extraordinary opportunity to achieve a measure of real deregulation to be lost.

If the Administration is not to rearm the opposition and invite reversal of many of its policies in subsequent elections, it must do more than merely reject what agencies have been doing. What will be required is the establishment of new policies and regulatory initiatives that reflect the needs of society as a whole. No one familiar with Washington assumes the task will be easy. Many of the targeted rules will not be changed for months, or years, and myriad regulations have yet to be reviewed. Only a balanced approach embracing the needs of all society done in an atmosphere of procedural fairness for all parties, and with a sharp eye towards the elimination of excessive government intrusion and paperwork, will bring about the lasting benefits that should be the true goal of deregulation. ♦

Deregulation—II

Student Financial Aid Deregulation: Rhetoric or Reality?

by ROBIN E. JENKINS

Despite President Reagan's promise to reduce federal regulation of postsecondary education, business officers should anticipate significant increases in the cost of administering federal student aid programs in 1982-83 due to increased regulations. Officials from the Office of Management and Budget (OMB) and the Department of Education (ED) have told NACUBO that additional administrative requirements will become effective during the next year because colleges and universities have managed the aid programs poorly.

NACUBO rejects the charge that student aid programs have been managed poorly by institutions. A more plausible reason for these new regulations is that OMB and ED's Budget Division are attempting to keep the aid programs within the Administration's budget proposal at the expense of students and institutions. Most of the inefficiencies in student aid programs result from poor communications within ED, between ED and OMB, and between ED and institutions.

This article illustrates the regulatory and communications quandary surrounding these programs in areas including the proposed Pell validation requirements, and program reviews and fiscal audits. Business officers are advised that several other regulatory areas present potential problems for program administration, including late issuance of cost of attendance rules, GSL needs test rules, and Pell family contribution schedule; plus delayed campus-based allocation figures and uncertainty over cost of administration fees.

Robin E. Jenkins is NACUBO's senior program manager for student-related programs.

Excessive Validation

Over the last several months, OMB and ED have directed much media attention to the preliminary findings of a quality control study of the Pell Grant program. An outside contractor, unaffiliated with the government or higher education, performed the analysis. The most significant *preliminary* finding of the study was that an estimated one-third of all students applying for Pell Grants incorrectly portray their financial situation. While the study did not hold colleges and universities solely responsible for this error rate, it did suggest that if institutions had validated every Pell Grant application, significant cost savings would have occurred.

Consequently, OMB and ED began to calculate budget savings for 1982-83 based on the assumption that if institutions validate these student aid reports (SARs) in the fall, cost savings will be realized by the end of the year. To this end, OMB and ED approached Congress with a request to redirect $3 million of program money —funds that would otherwise have been used to make awards to students—to pay the cost overrun incurred in printing validation requirements on student eligibility reports. Despite OMB's and ED's insistence, the House Appropriations Subcommittee on Labor-HHS-Education has twice refused the request to redirect funds. The department, however, continues to want regulations requiring institutions to validate 100 percent of eligible Pell Grant applicants this fall.

The most obvious additional administrative cost to institutions is the labor-intensive effort required to compare a student's income as stated on IRS Form 1040 to that on the SAR. Dallas Martin, executive director of the National Association of Student Financial Aid Administrators, estimates that the average additional time required to validate SARs will drive up significantly the personnel costs of the financial aid office.

Institutions must adjust the SAR for students with discrepancies over a set amount ($100 is the proposed figure) and submit it for reprocessing. Financial aid officers indicate that the $100 figure is too low and that many students, with no malice intended, will have larger discrepancies.

Another potential cost relates to the timing of validation. Although an institution may disburse the first installment of a Pell Grant before recovering the validating document (normally a Form 1040), the institution is liable for any overaward that may occur because of an incorrect SAR. The institution will be liable also for the total disbursement if the validating document is not received.

Considering the potential cost of this Pell Grant validation requirement, it is ironic that ED discovered substantial extrapolation errors in the quality control study and has been forced to lower significantly the estimates of the cost savings of requiring institutions to validate all Pell Grant SARs this summer.

Monitoring Compliance

ED plans to subject colleges and universities to financial double-jeopardy regarding liability for complying with student financial aid regulations. This takes the form of biannual financial audits conducted by independent external auditors plus program reviews conducted by ED's regional program staff.

Institutions have had to absorb the cost of biannual financial audits since 1978 when HEW decided to transfer responsibility. The audits are conducted with minutely detailed and inflexible audit guides, and a significant part of the process is dedicated to evaluating the institution's performance with regard to the most recent federal regulations. Many institutions have had to suffer substantial financial liabilities for disallowances resulting from minor deviations.

During the last year, NACUBO has worked closely with the inspector general's staff in the Department of Education to develop an alternative approach to student financial aid audits. ED's inspector general is reviewing this spring a concise, single student-aid audit guide of only 50 pages that would replace this summer the flawed guides now used for the Pell Grant and campus-based programs. The objective of the new guide is to insure accountability on the part of colleges and universities without subjecting them to unreasonable financial exposure.

Just as this effort was about to provide relief to beleaguered institutions, another and potentially more harmful threat was emerging in the regional program review. A few years ago, program reviews were intended to provide technical assistance to institutions and to foster a working relationship between campuses and regional officials. Emphasis is given now to aggressive inspection of institutional procedures in the search for deviations from federal regulations. It is fair to say that many regional personnel believe their own promotions depend on uncovering irregularities in institutional administration of student aid and not on providing technical assistance to institutions. This unfortunate situation is made worse by recent policy interpretations that will permit regional program reviewers to assess financial liabilities to institutions.

NACUBO learned recently of a new program review manual prepared for use in the regions. The manual is 600 pages long and duplicates much of the material in the old audit guides. More disturbing is ED's acknowledgment that *there is no formal program review appeals process*. The institution is actually at the mercy of regional reviewers.

Such a program review philosophy raises the question of whether the right hand of government knows what the left hand is doing. Apparently, the office of compliance in ED has been so busy preparing the new program reviews that its personnel did not communicate with the inspector general's office about the relationship between the financial audit and the program review. At present, there is no coordination between these evaluations; an institution could be subject to both the financial audit and the program review in the same year and be held liable for different sums. ED has failed to respond to NACUBO's inquiries about the apparent duplication. One is left with the impression that ED considers it easier to defend itself against accusations that it has violated appropriate bounds for program review if the department continues to leave undefined the purpose and scope of such reviews.

Communication With Campuses

It comes as no surprise that ED continually informs institutions about major changes in federal student aid programs in an untimely and often inadequate manner. In the relatively short period of 16 months, the Department of Education has on three occasions mishandled the communication to campuses of significant regulatory changes.

The first involved three "dear colleague" letters informing institutions of complex changes in NDSL interest rates, grace periods, and deferment provisions. The first letter arrived on most campuses after the effective date had passed; the two remaining were vague and produced much confusion on campus about effective dates and provisions for the signing of open-ended and limited-duration promissory notes.

The second major misstep was publication of a mistake-filled version of the new promissory note in the January 19, 1981 *Federal Register*. When the mistakes were discovered, the department printed an addendum in *The Bulletin*, a publication of the Office of Student Financial Assistance. However, the addendum itself was incorrect. A correct note was finally released on June 24, one week before the new note was to be in use for all loans. Many institutions had already printed the faulty note and were forced to bear the additional expense of reprinting.

The third major communication problem is ongoing and deals with the implementation of ED's new payment system. Since July 1981, colleges and universities have received only three "dear colleague" letters announcing the new payment system and the procedures for transferring institutional accounts from DFAFS to ED. These letters were obtuse and misleading and often failed to reach the appropriate office in the institution. ED had also promised to send each institution a copy of a detailed users manual that fully explained the new system. NACUBO has been informed that this users manual will not be sent to campuses until early May 1982 because of a governmentwide freeze on printing. Those proprietary, two-year, and small colleges that are being brought on to the system as of April 1 are experiencing severe problems because of poor communication.

The absence of clear and timely communication on regulation issues is inexcusable. To compound the effect of added costs as they try to meet regulatory demands, institutions face liability if they are unable to carry out—often "overnight"—the required changes.

Conclusion

The most disturbing aspect of stricter regulations, policy interpretations, and lack of communication is that they are in fact being used to strangle federal student aid programs while being presented to the public as enhancing accountability. It is thus probable that colleges and universities will have to endure yet another year of unpredictable performance by ED.

If OMB and ED are sincere in their stated desire to pursue student aid regulatory reform, they should invite the higher education community to join with them in a partnership to examine alternative administrative approaches to efficient conduct of aid programs. Precedent for such a partnership has been set by the recent effort of NACUBO and the inspector general's office to redesign student aid audit procedures. This exchange of ideas, priorities, and talents appears to have resulted in a workable document that serves the needs of higher education and protects the interests of the federal government.

Until such a partnership is established, any ED rhetoric concerning reform of student aid regulation is empty. ◆

Deregulation—III

Administration Reform of Civil Rights Rules: A Year's Work?

by R. CLAIRE GUTHRIE

In the year since the Vice President's Task Force on Regulatory Relief was constituted by President Reagan, the Administration's efforts to reform civil rights rules have been criticized severely by both civil rights activists and "management" representatives. For example, in February 1982 the outgoing chairman of the U.S. Civil Rights Commission, Arthur Flemming, characterized the Department of Education's civil rights "deregulation" initiatives as "a concerted retreat from full enforcement of civil rights requirements in education." At the same time, attorneys representing business interests criticized as "Carter-like" and as a "reaffirmation of the status quo" the Department of Labor's assertion, in a brief filed in February 1982 in a discrimination case involving Harris Bank, that the Office of Federal Contract Compliance Programs has authority to seek back pay from federal contractors under Executive Order 11246.

The fact is the sky has not fallen this year either on individuals protected by federal civil rights rules or on institutions and businesses covered by those rules. Despite "hit lists" of regulations targeted for "in-depth agency review," numerous speeches by the assistant attorney general for civil rights criticizing affirmative action, and genuine efforts by Education Department officials to identify what they call "targets of opportunities" for reducing unnecessary and burdensome civil rights regulations within their jurisdiction, the rules in effect in May 1982 are identical to those in effect the previous May, and no proposals have been published for comment that would alter significantly the substance of existing civil rights requirements.

The Department of Education's Title IX rules, which now can be enforced by individual lawsuits as well as by agency action, still contain provisions barring sex discrimination in college and university athletic programs and against employees of colleges and universities that receive federal aid. The Department of Labor's existing and proposed rules under Executive Order 11246 continue to require federal contractors to take affirmative action with respect to women and minorities and to establish employment goals and timetables. The Equal Employment Opportunity Commission's Uniform Employee Selection Guidelines continue to obligate all college and university employers to insure that selection criteria and processes they use in hiring staff *and* faculty do not have an adverse impact on minorities and women.

The fact that texts of various agency regulations have not been amended to date does not mean there have been no developments worth noting in the last year. There have in fact been several, and they are summarized under appropriate agency headings below. Most have occurred in the context of pending litigation rather than as a result of executive branch initiative. However, substantial efforts by Education Department officials to reduce the adversariness of their voluntary compliance efforts, particularly with respect to Title IX athletics reviews, are an exception and should be welcomed wholeheartedly by the higher education community.

Department of Education

Much has been written in 1982 about efforts by the Department of Education (ED) to limit the scope of the agency's jurisdiction to investigate discrimination complaints under Title IX (sex), Title VI (race, color, national origin), and section 504 (handicap), but no changes in the department's rules have been made to date. ED sought to interpret Title IX as applying exclusively to students and to amend the definition of "federal financial assistance" to exclude all federal student aid. For the most part, the Department of Justice blocked those efforts, although some narrowing of ED's authority may result from the ultimate resolution of pending cases.

The Department of Justice rebuffed almost completely ED's arguments in favor of changing sides in three Title IX cases now pending in the federal courts. ED officials wanted to side with defendant schools in each instance. In addition, pursuant to its civil rights coordinating authority, Justice refused to approve ED's proposal to amend the definition of "federal financial assistance" used in its Title VI, Title IX, and section 504 regulations to exclude from coverage all federal student aid.

Briefs filed by the Justice Department in *North Haven Board of Education* v. *Bell*, *Grove City College* v. *Bell*, and *University of Richmond* v.

R. Claire Guthrie is assistant general counsel for the American Council on Education.

Bell give the clearest indication to date of Administration views on the jurisdictional questions raised by Education Secretary Terrel Bell in letters to the attorney general. In *North Haven*, the brief filed by the Justice Department in the Supreme Court in September 1981 argues employment discrimination should be covered under Title IX but says the Title IX regulation "implicitly provides that the mere receipt of some federal assistance by an educational institution does not necessarily subject all of its employment practices to the prohibition of section 901 of Title IX and the implementing regulations."

How ED can or will incorporate this "implicit provision" in its enforcement efforts is unclear, although Justice definitely has suggested some limitation of the scope of ED's enforcement authority as it exists under current law. Other language in the brief appears to suggest that ED focus its attention (1) on the definition of "program or activity" as that phrase is used in Title IX, Title VI, and section 504, and (2) on the determination of whether an "education program" ED seeks to regulate receives or benefits from federal financial assistance.

In the *University of Richmond* case, the Justice Department brief filed in federal district court in spring 1982 asserts unequivocally that student aid is "federal financial assistance" to institutions as well as students and that receipt of such aid through students obligates an institution to allow ED to investigate its education programs, including its athletics programs, for compliance with Title IX.

In *Grove City*, the government's position in the Third Circuit Court of Appeals is that Pell Grants constitute "federal financial assistance" to colleges and universities sufficient to confer Title IX jurisdiction, but that the Guaranteed Student Loan program falls within the statutory exclusion from coverage of "contracts of insurance or guaranty." Under Justice's *Grove City* argument, an institution that receives no federal grants and enrolls students who receive only Guaranteed Student Loans (not Pell Grants, Supplemental Educational Opportunity Grants, National Direct Student Loans, College Work-Study funds, or veterans benefits) arguably could be exempt from coverage under Title IX, Title VI, and section 504.

Recent press reports have indicated that ED soon will propose substantive changes in the department's section 504 rules. Any such changes must be approved by the Justice Department before publication, and it is premature to speculate at this time about the nature of the changes to be proposed.

Labor Department

In August 1981 the Office of Federal Contract Compliance Programs (OFCCP) published proposed rules that would provide for consolidated enforcement of Executive Order 11246, section 503 of the Rehabilitation Act of 1973, and section 402 of the Vietnam Era Veterans Readjustment Act. Among the major changes proposed in current rules applicable to colleges or universities that are federal contractors are: the elimination of the pre-award review requirement for contracts of $1 million or more; an increase from $50,000 to $1 million in the dollar figure that triggers the requirement to have a written affirmative action plan; and an amendment to the employee benefit provisions of the executive order rules that would require federal contractors to provide equal monthly retirement benefits to similarly situated male and female employees. In addition to these proposals, OFCCP requested comments regarding (1) its authority to seek back pay awards from federal contractors and (2) the appropriateness of current job group rules and the eight-factor analysis for determining availability.

The proposed changes have not been implemented yet, and all of the current rules remain in effect. According to recent public statements by various OFCCP and Labor Department officials, OFCCP plans to publish in late spring 1982 a revised set of proposals incorporating changes in the availability analysis and job group definitions. Final rules are scheduled for publication by late summer.

Equal Employment Opportunity Commission

Two of the commission's guidelines were "targeted" by the Bush Task Force for in-depth review, but agency consideration of these "recommendations" has been impeded because the EEOC has not had enough members to constitute a quorum. Some employer representatives criticized the commission's Sexual Harassment Guidelines because they state that employers are "strictly liable" for sexual harassment by supervisors. The American Council on Education questioned the appropriateness of the Uniform Employee Selection Guidelines for faculty and other management personnel decisions. Now that the commission is at full strength, it may wish to review these provisions.

In an apparent effort to respond to employer concerns about the Sexual Harassment Guidelines, the general counsel of the EEOC has said he intends to exercise "prosecutorial discretion" to limit sexual harassment cases the agency litigates to those involving employers that can be shown actually to have countenanced sexual harassment by supervisors. However, courts applying the guidelines in individual lawsuits are likely to be guided by what is written rather than by what is said, and unless the guidelines are amended, strict liability is the standard the courts are likely to apply.

The Supreme Court recently heard arguments in *Connecticut* v. *Teal*, a case raising questions about the proper application of the selection guidelines to employment decisions made by public employers. The plaintiff's position in the case is that each criterion applied in making an employment decision must be free of adverse impact on women and minorities, while the state of Connecticut, joined by the U.S. Department of Justice, argues that the impact of the selection process as a whole should be judged. The EEOC took no position in the case, although the decision may circumscribe its compliance activities regarding private employers. The Supreme Court's decision in the case should be rendered by late June 1982. ♦

business officer

Newsmagazine of the National Association of College and University Business Officers

Editor
Jeffrey M. Sheppard

Portfolio Editor
David W. Jacobson

Contributing Staff
Darryl Brown, Stephen Foster, Janet Jackley, Maurese Owens Anne Price, Michael Weaver

Executive Vice President
D. F. Finn

NACUBO Board of Directors

President: Herman D. Johnson, *University of California, San Diego*

Vice President: Caspa L. Harris, Jr., *Howard University*

Secretary: Frederick R. Ford, *Purdue University*

Treasurer: Fred S. Vorsanger, *University of Arkansas*

Robert L. Carr, *Office of the Council of State College and University Presidents* (Washington State); Donald Cole, *Western Washington University;* Joe F. Evans, *Washington University;* Donald Hume, *New York University;* Raymond M. Krehel, *Colgate University;* Carroll J. Lee, *University of New Mexico;* Roger D. Lowe, *Wichita State University;* Warren R. Madden, *Iowa State University;* George B. May, *Amherst College;* Charles C. Teamer, *Dillard University;* John L. Temple, *Emory University.*

Business Officer (ISSN 0147-877X) is published monthly by NACUBO, One Dupont Circle, Suite 510, Washington, DC 20036, telephone 202-861-2500. Second-class postage paid at Washington, DC. Of annual membership dues, $30 is for a subscription to *Business Officer.*

© 1982 All material except that appearing in *Portfolio, Columns,* or otherwise restricted may be reproduced for internal distribution if proper credit is given. Unauthorized use is strictly prohibited.